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IN THE

Supreme Court of the United States

October Term, 1948

No. 275
Misc. No. 119

JESSIE A. KILPATRICK, *Petitioner,*
—against—
THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent.*

No. 276
Misc. No. 120

L. M. PARKER, *Petitioner,*
—against—
THE TEXAS AND PACIFIC RAILWAY COMPANY, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND IN OPPOSITION TO PETITIONS FOR WRITS OF PROHIBITION TO THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

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INDEX

PAGE

Statement 1

ARGUMENT

POINT I

The petitions for writs of certiorari should be denied because the orders which petitioners seek to have reviewed are not final orders 3

POINT II

The petitions for writs of prohibition should be dismissed because the district court clearly has exclusive jurisdiction over the actions now pending in that court 5

POINT III

Petitioners' motion for a stay of proceedings in the District Court for the Northern District of Texas should be denied because this Court has no jurisdiction with respect to the Texas actions 6

CONCLUSION 7

Table of Cases Cited

PAGE

Atlantic Coastline Railroad Company v. Winn, 227 Fed. 50 (CCA 5th 1915) 5

Beighle v. Le Roy, 94 F(2d) 30 (CCA 3rd 1938) 5

Catlin v. United States, 324 U. S. 229, 233-234 (1945) 5

Ex parte Fahey, 332 U. S. 258 (1947) 6

Ex parte United States, 263 U. S. 389 (1923) 6

Grand Trunk Western Railroad Company v. McHie (CCA 6th 1938) 5

Heike v. United States, 217 U. S. 423, 428-429 (1910) 3

Libby, McNeil & Libby v. Malmskold, 115 F(2d) 786 (CCA 9th (1940)) 5

Merriman v. Chicago & E. I. R. Co., 64 Fed. 535 (CCA 7th (1894)) 5

Poliszek v. Doak, 57 F(2d) 430 (App. D. C. 1932) 6

Smith v. Whitney, 116 U. S. 167 (1886) 6

Other Authorities Cited

Rules of Civil Procedure

Rule 41 (a)(2) 1

Section 2101 (e) of the Federal Judicial Code (Title 28 U. S. Code) 6

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Statement

Petitioners seek, by their petitions for certiorari, to have this Court review, prior to any hearing or decision by the Circuit Court of Appeals for the Fifth Circuit, two orders entered in the District Court for the Northern District of Texas denying motions by petitioners, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, to dis-

miss the complaints. Petitioners also seek, by their petitions for writs of prohibition, to invoke the original jurisdiction of this Court to direct the District Court for the Northern District of Texas to proceed no further with the actions now pending in that Court on the ground that it has been divested of jurisdiction by reason of the appeals taken by petitioners to the Circuit Court of Appeals for the Fifth Circuit.

Respondent opposes the petitions for certiorari and the petitions for prohibition on the ground that this Court does not have jurisdiction to review the only orders which petitioners seek to have reviewed in this Court; namely, the orders of the District Court denying petitioners' motions to dismiss the complaints. Respondent contends, as the Circuit Court of Appeals for the Fifth Circuit has held,*

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* The full opinion of the Circuit Court of Appeals for the Fifth Circuit denying petitioners' petitions for writs of prohibition on April 13, 1948 in this case is as follows:

> "PER CURIAM: Petitioners, plaintiffs in separate suits in the court below, moved there for a dismissal without prejudice of their suits. Their motions denied, each filed notice of appeal. Alleging that respondent notwithstanding their appeals had set the causes for trial and, unless prohibited from doing so, would proceed to trial in them, each has filed a petition for writ of prohibition.
>
> "This court may issue writs of prohibition only in aid of its jurisdiction to review final decisions of the district courts.[1] It appears from the motion papers and the answers thereto that petitioners' attempted appeals from orders denying dismissal are not from final judgments.[2] It is quite plain that this court is without jurisdiction to consider the merits of the questions sought to be raised in the applications for the writs and that for want of jurisdiction the petitions must be denied.

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[1] 28 USCA 225; *Smith* v. *Whitney*, 116 U. S. 167; *In Re: The Petition of United States*, 263 U. S. 389; *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21.

[2] *Grand Trunk Western R. Co.* v. *McHie*, 100 F(2) 86; *Atlantic Coast Line R. Co.* v. *Winn*, 227 Fed. 50; *Heike* v. *U. S.*, 217 U. S. 423."

that the orders of the District Court are not final orders and, therefore, are not appealable. For want of jurisdiction the petitions for certiorari should be denied and the petitions for writs of prohibition should be dismissed.

ARGUMENT

I

The petitions for writs of certiorari should be denied because the orders which petitioners seek to have reviewed are not final orders.

The orders denying petitioners' motions to dismiss the complaints certainly are not final and appealable orders within the test laid down by this Court in the case of *Heike* v. *United States*, 217 U. S. 423, 428-429 (1910):

> "The construction of §5 of the Court of Appeals Act was before this court in the case of *McLish* v. *Roff*, 141 U. S. 661, 665, and it was there held that the allowance of appeals or writs of error under that section must be understood to have the meaning which those terms had always had under acts of Congress relating to the appellate jurisdiction of this court, and that taken in that sense appeals or writs of error could only be allowed in cases in which there had been a final judgment. Mr. Justice Lamar, who spoke for the court in that case, pointed out that under the Judiciary Act of 1789 no appeal would lie to this court except from final judgments or decrees, and further stated that this was only declaratory of the settled practice of England, where no writ of error would lie except from a final judgment; and if the writ was made returnable before such judgment it would be quashed, and in this connection, speaking for the court, the learned justice said:

'From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.'

McLish v. *Roff, supra,* has been followed and approved in this court. *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U. S. 372; *Kirwan* v. *Murphy,* 170 U. S. 205, 209; *Ex parte National Enameling Co.,* 201 U. S. 156.

It may, therefore, be regarded as the settled practice of this court that a case cannot be brought here by piecemeal, and is only to be reviewed here after final judgment by direct appeal or writ of error in a limited class of cases under §5 of the Court of Appeals Act.

It is unnecessary to enter upon a full consideration of what constitutes a final judgment, a subject of much discussion. The definition of a final judgment or decree was tersely stated by Mr. Chief Justice Waite in *St. Louis, Iron Mountain & S. R. R. Co.* v. *Express Co.,* 108 U. S. 24, 28, in these terms: 'A decree is final for the purposes of an appeal to this court when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.'"

By no possible construction can it be said that the orders of the District Court denying petitioners' motions to dismiss the complaints terminate the litigation between the parties on the merits and leave nothing to be done but to enforce by execution what has been determined. The District Court, in denying petitioners' motions to dismiss the complaints, simply held that the cases should proceed to trial.

The rule that non-final orders of the character of those which petitioners seek to have this Court review are not appealable, has been rigidly adhered to without exception in the Federal courts.

Catlin v. *United States*, 324 U. S. 229, 233-234 (1945);
Libby, McNeil & Libby v. *Malmskold*, 115 F(2d) 786 (CCA 9th (1940));
Grand Trunk Western Railroad Company v. *McHie*, 100 F(2d) 86 (CCA 6th (1938));
Beighle v. *Le Roy*, 94 F(2d) 30 (CCA 3rd 1938);
Atlantic Coastline Railroad Company v. *Winn*, 227 Fed. 50 (CCA 5th 1915);
Merriman v. *Chicago & E. I. R. Co.*, 64 Fed. 535 (CCA 7th (1894)).

In the case of *Libby, McNeil & Libby* v. *Malmskold*, *supra*, the Court stated (p. 787):

> "It seems too plain for argument that the denial of a motion for a nonsuit or to direct a verdict is not a final decision. *So also as to a motion to set aside a verdict or to dismiss without prejudice.*" (Italics added.)

II

The petitions for writs of prohibition should be dismissed because the District Court clearly has exclusive jurisdiction over the actions now pending in that Court.

The *per curiam* opinion of the Circuit Court of Appeals for the Fifth Circuit* in denying the petitions for writs of

* This opinion is set forth in full at page 2, *supra*.

prohibition filed by petitioners in that Court constitutes a convincing statement of why the petitions for prohibition should be denied by this Court.

Moreover, it repeatedly has been held by this Court and by other Federal courts that the writ of prohibition is an extraordinary remedy, reserved for "really extraordinary causes", and is not to serve the office of an appeal.

Ex parte Fahey, 332 U. S. 258 (1947);
Ex parte United States, 263 U. S. 389 (1923);
Smith v. *Whitney*, 116 U. S. 167 (1886);
Poliszek v. *Doak*, 57 F(2d) 430 (App. D. C. 1932).

III

Petitioners' motion for a stay of proceedings in the District Court for the Northern District of Texas should be denied because this Court has no jurisdiction with respect to the Texas actions.

The power of this Court to stay proceedings in a case in which a petition for certiorari is pending in this Court is defined in 28 U. S. C. §2101(e) as follows:

> "(e) In any case in which the *final judgment or decree* of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order

granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay." (Italics added.)

Inasmuch as the orders which petitioners seek to have reviewed in this Court are not final orders and therefore are not appealable, it is abundantly clear that this Court has no jurisdiction with respect to those orders and, accordingly, has no power to stay proceedings in the District Court actions as requested by petitioners.

CONCLUSION

The petitions for writs of certiorari to the Circuit Court of Appeals for the Fifth Circuit should be denied; the petitions for writs of prohibition to the District Court for the Northern District of Texas should be dismissed; and petitioners' motion for a stay of proceedings in the District Court for the Northern District of Texas should be denied.

Dated: Fort Worth, Texas, October 1, 1948.

Respectfully submitted,

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